



November 6, 2018

Privilege & Work Product – Where it Fits, Where it Doesn't

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Presentation Overview

- Privileges & Protections in Transactions
 - ❖ Attorney Client Privilege
 - ❖ Tax Practitioner Privilege
 - ❖ Work Product
- *Kovel* Doctrine
- Best practices
- Discussion Questions

Common Privileges & Protections in Transactions

- Common Law Privileges & Protections
 - Attorney-Client Privilege
 - Common Interest Privilege
 - Attorney Work Product
- Statutory Privileges & Protections
 - Attorney Work Product (Fed. R. Civ. Pro. 26(b)(3))
 - Tax Practitioner Privilege (Code § 7525)

Attorney-Client Privilege

Key Elements of Attorney-Client Privilege:

1. Protects oral or written communications
2. Between an attorney and his/her client
3. That are intended to be confidential
4. And are made in order to obtain legal advice

AND

Privilege has not been waived.

Communications Between Attorney and Client

When the privilege applies:

- Attorney is acting in his/her capacity as an attorney and communicating with his/her client
- Communication is made between an attorney and a prospective client for purposes of obtaining legal advice

When the privilege does not apply:

- Attorney is not acting as a lawyer
- There is no attorney-client relationship between the attorney and the other person or firm

Privileged?

From: Lawrence Lawyer (Legal)
Sent: Friday, April 21, 2017
To: Lisa Swindon (Finance); John Anderson (Finance); Mark McKinnon (Finance)
CC:
Subject: New M&A deal

Why are we borrowing through JumboBank? We've got a close relationship with LoanBank and might be able to get a lower interest rate from it.

From: Mark McKinnon (Finance)
Sent: Friday, April 21, 2017
To: Lisa Swindon (Finance); John Anderson (Finance); Lawrence Lawyer (Legal)
CC:
Subject: New M&A deal

All—I've attached the draft credit agreement for the SubCo acquisition. It looks good to me, but give me any comments you have.

Communications Intended to be Confidential

When the privilege applies:

- Communications that are made directly between the attorney and his/her client outside the presence of persons who are not part of the attorney-client relationship
- Communications among clients (attorney copied) that meet other requirements for privilege

When the privilege does not apply:

- Communications in the presence of persons who are not part of the attorney-client relationship
- Communications that are not intended to be confidential
- Document that was not created for purposes of obtaining legal advice

Privileged?

From: Alexa Smith (Finance)

Sent: Friday, April 21, 2017

To: Steve Campbell (Finance); Joe Baker (Accounting)

CC:

Subject: Status update

Guys, I just got off the phone with Larry Lawyer in Legal and he told me that we need to make sure that ForeignCo isn't a guarantor of any of ParentCo's obligations in our credit agreements. We may need to have a meeting with Larry so that he can explain in more detail

Communications Made For Purposes of Obtaining (Providing) Legal Advice

When the privilege applies:

- Communications that are made for purposes of obtaining or providing legal advice

When the privilege does not apply:

- Non-legal matters
- Business advice
- Tax return preparation
- Communications that are not intended to be confidential

Privileged?

From: Lawrence Lawyer (Legal)
Sent: Friday, April 21, 2017
To: Kate Connell (Investor Relations); John Anderson (Accounting); Mark McKinnon (Accounting)
CC:
Subject: S-1 tax disclosure

My comments:

“ParentCo recorded deferred changes charges during the year ended December 31, 2106 2016, related to the deferral of income tax expense on intracompany intercompany profits that resulted from the sale of its intellectual property rights to our Mexican subsidiary, MexSubCo. The deferred charges are amortized as a component of income tax expense over the five-year economic life of the intellectual property.”

From: Mark McKinnon (Accounting)
Sent: Friday, April 21, 2017
To: Kate Connell (Investor Relations); John Anderson (Accounting); Lawrence Lawyer (Legal)
CC:
Subject: S-1 tax disclosure

All—Please review the below portion of the draft tax disclosure for ParentCo’s IPO.

Thanks.

“ParentCo recorded deferred changes during the year ended December 31, 2106, related to the deferral of income tax expense on intracompany profits that resulted from the sale of its intellectual property rights to our Mexican subsidiary, MexSubCo. The deferred charges are amortized as a component of income tax expense over the five-year economic life of the intellectual property.”

Privileged?

From: John Anderson (CEO)
Sent: Friday, April 21, 2017
To: George Swindon (Accounting); Lawrence Lawyer (Legal); Mark McKinnon (Accounting)
CC:
Subject: Transaction article

FYI

<http://www.taxnotes.com/tax-notes-today/subchapter-s-corporations/stock-surrender-and-repurchase-lacks-economic-substance/2017/04/25/sxk6>

Privileged?

From: John Anderson (CEO)
Sent: Friday, April 21, 2017
To: Kate Connell (Accounting); Lawrence Lawyer (Legal); Mark McKinnon (Accounting)
CC:
Subject: Transaction article

Will this affect our acquisition of SubCo?

<http://www.taxnotes.com/tax-notes-today/subchapter-s-corporations/stock-surrender-and-repurchase-lacks-economic-substance/2017/04/25/sxk6>

Privileged?

From: Perry Groves (Marketing)

Sent: Friday, April 21, 2017

To: Leslie Compton (Marketing); Kevin Richardson (Marketing); Lawrence Lawyer (Legal); George Swindon (Investor Relations); John Anderson (Communications) ; Samantha Stone (Communications); Charles Jefferson (Accounting); Thomas Delaney (Marketing)

CC:

Subject: New M&A deal

Please send any comments on the proposed press release by Tuesday COB.

Thanks,

Perry

“On April 20, 2017, ParentCo completed its previously announced acquisition of SubCo, Inc. at a purchase price of \$515 million, subject to customary price adjustments, via reverse triangular merger.

SubCo is an Atlanta, Georgia-based company that develops, markets, distributes, licenses and sells software throughout the world.

ParentCo’s acquisition of SubCo represents ParentCo’s expansion into software and is part of the ongoing growth of ParentCo’s operations globally.”

Waiver of Attorney-Client Privilege

- Privilege belongs to the client, who may invoke it or (expressly or impliedly) waive
- Waiver occurs when the privileged communication or its substance is shared with a third party, outside the lawyer-client relationship (e.g., auditor, gov't agency)
 - ❖ Disclosing the mere existence of the advice is not a waiver
- Waiver can occur at the time of the communication or at any time thereafter
- Waiver of a privileged communication is a “subject matter waiver” requiring broader disclosure, the scope of which is generally judged under a fairness standard
 - ❖ See Fed. Rule of Evidence 502

Privileged?

From: John Anderson (CEO)
Sent: Friday, April 21, 2017
To: Susie Anderson <susieand@ceospousemail.com>
CC:
Subject: Dinner

Honey,

Looks like we're going to be on conference calls all night dealing with this latest crisis. Don't wait on dinner for me.

From: Lawrence Lawyer (Legal)
Sent: Friday, April 21, 2017
To: John Anderson (CEO); Stewart Robson (Sales); Bill Clark (Sales)
CC:
Subject: Merger issue

PRIVILEGED AND CONFIDENTIAL

We've had a major setback in finalizing the merger with SubCo. It looks like we might not get antitrust clearance from the FTC without further changes to the deal.

Can we all get on a call tonight to discuss our strategy?

Express vs. Implied Waiver

- A waiver may be purely voluntary, made for business or strategic reasons
- A waiver may be “implied,” such as when a taxpayer asserts the defense of reasonable cause/good faith/ reasonable reliance on qualified advice in response to an asserted penalty, putting the advice “at issue”
- An *inadvertent* waiver is generally not considered a waiver under the Fed. Rule of Evidence 502(b) where there were reasonable steps to prevent disclosure and a prompt attempt to rectify

Privileged?

From: Will Young
Sent: Friday, April 21, 2017
To: Ella Bonsen (Outside Accountant); John Anderson (Outside Accountant);
CC:
Subject: FW: NewCo acquisition

George and John,

Our lawyer doesn't like the terms of the SubCo-ParentCo loan. Do you agree?

From: Lawrence Lawyer (Legal)
Sent: Friday, April 21, 2017
To: Will Young
CC:
Subject: NewCo acquisition

Will,

We can't structure the loan from SubCo to ParentCo in this manner. SubCo needs customary rights to enforce the terms of the note. Otherwise, the loan might be treated as equity.

Privileged?

From: Alex Smith

Sent: Friday, April 21, 2017

To: Steve Campbell; Lynn Wills; Joe Baker; Bonnie Dodge; Jack Rutherford; Pat Rice; Lawrence Lawyer; Fred Davis; Ellen Ball; Terry Neill; Jimmy Jackson; Vic Groves; Barbara Wilson; Tyrone Gibson; Ian Hopkinson; Gavin Crawford; Meredith McNichol; Tammy Briercliffe; Sandy Graham; Liz Gold; Sidney Roberts; Kelly Edwards; Frances Henderson; Paula Kennedy; Tommy Coleman; Rod Sands; Wally Barnes; Charlie Gray; David Sharp; Andy Thorp; Cynthia James; Jonathan Wolf; Angus Cross; David James; Beth Sugar; Theresa Lewis; Duncan McNichol; Bill Goolsby; Coleen Tillman; James Sharp; Ray Mercer; Ted Drake; Ron Lewis; Rhonda Hart; George Hayes; Lena Moss; Lionel Gates; Danielle Bryant; Richard Hanks; Samantha Stone; Charles Jefferson; Thomas Delaney; Clifford Ian McPherson; Bob Wilson; John Radford; Peter Simpson; Sue McDonald; Heather; Roberts; Charlie Jones

CC:

Subject: Acquisition of NewCo

PRIVILEGED & CONFIDENTIAL

We just concluded the acquisition of NewCo, which will be financed by a loan to ParentCo from SubCo. We will need to treat the financing as a loan in all respects. If the IRS challenges our characterization, how will we explain the cash transfer?

Tax Practitioner Privilege (Code § 7525)

- Limited statutory privilege that extends attorney-client privilege to communications between a taxpayer and a “federally authorized tax practitioner”
- A “federally authorized tax practitioner” is “eligible to practice” before the IRS under Circular 230, including attorneys, CPAs, enrolled agents and enrolled actuaries (can include in-house tax advisors)
- Where applicable, operates just like **attorney-client privilege**, including as to waiver

Privileged?

From: Cliff O’Leary (Tax)
Sent: Friday, April 21, 2017
To: John Jones (Outside Accountant)
CC:
Subject: Preparation of 2016 tax return

John,

As you know, ParentCo is currently acquiring a Mexican company. Will ParentCo report the Mexican taxes paid by that company on Form 1118 (“Foreign Tax Credit—Corporations”) when filing its 2016 tax return?

Thanks,

Cliff

Limitations of Tax Practitioner Privilege

- IRC sec. 7525 privilege applies only to federal tax proceedings before the IRS or in federal court versus the US Government
- Does not apply in state tax proceedings, non-tax Federal proceedings (e.g., vis-à-vis the SEC), or private litigation (e.g., shareholder derivative suit, malpractice case)
 - ❖ Disclosure therein operates as a waiver
- Does not apply to tax return preparation
- Does not apply to criminal tax matters
- Does not apply to pre-transaction written communications made in connection with the promotion of a tax shelter

Privileged?

From: Sidney Gibbs (Big Four Accounting Firm)
Sent: Friday, April 21, 2017
To: Cliff O'Leary (Tax); John Anderson (Finance)
CC: Lawrence Lawyer (Legal); Mark McKinnon (Accounting)
Subject: IrishCo Inversion

Cliff and John,

We have made substantial progress in implementing the IrishCo-ParentCo inversion, consistent with the opinion letter ParentCo received from Williams & Wilson, LLP. There are a few significant tax issues we have encountered, however, that we would like to discuss with you at the meeting next Monday.

Thanks,

Sidney

From: Roberta Lopez (Outside Counsel)
Sent: Friday, April 21, 2017
To: Cliff O'Leary (Tax); Lawrence Lawyer (Legal)
CC:
Subject: IrishCo Inversion Opinion

Cliff,

Attached is Williams & Wilson, LLP's opinion letter concerning the ParentCo-IrishCo inversion.

Thanks,

Roberta

Attorney-Client Privilege v. Tax Practitioner Privilege

	Attorney-Client Privilege	Code § 7525
Coverage	Attorneys, clients, <i>Kovel</i> s, joint defense/common parties	Federally authorized tax practitioners
Exclusions	None	<ul style="list-style-type: none"> ▪ Non-federal tax matters ▪ Criminal matters ▪ Tax shelter matters
Applicable Matters	All civil and criminal matters	<ul style="list-style-type: none"> ▪ Federal tax matters only ▪ Does not protect against disclosure in: <ul style="list-style-type: none"> ▪ Civil non-tax litigation ▪ State tax matters ▪ Non-tax matters
Applicable Advice	All legal advice	Federal tax advice <ul style="list-style-type: none"> ▪ Tax planning ▪ Representation in IRS Exam
Non-applicable Advice	Non-legal (business) advice Tax preparation	Same

Work Product Protection

- The Work Product Doctrine is judicially created, and is codified under FRCP 26(b)(3) and TC Rule 70(c)(3)
- Work Product “Protection” is based on the premise that attorneys must be able to carefully and thoroughly prepare a client’s case for litigation without undue interference from adversaries Protection may apply to same communications as Attorney-Client and Tax Practitioner Privilege, but Work Product Protection operates distinctly from those privileges
 - ❖ Including when the protection is properly invoked, who it impacts, how it is waived, and how it can be overcome by an adversary

Work Product Elements

- Protects documents and tangible things
- Prepared “in anticipation of litigation” or for trial
- By or for another party or its representative
 - ❖ Including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent
- Unless the opposing party demonstrates a “substantial need” for the materials and cannot, without undue hardship, obtain their substantial equivalent by other means
- However, there exists an almost absolute protection for “opinion work product” to prevent disclosure of the mental impressions, conclusions, opinions, or legal theories concerning the litigation

Privileged?

From: George Swindon (Accounting)
Sent: Friday, April 21, 2017
To: Lawrence Lawyer (Legal)
CC:
Subject: FW: ParentCo inversion

Larry,

The SEC just opened an investigation of Parent Co. Remember Mark's Memo on the Parent-Irish-Co loan? Do we have to provide it to the government?

From: Mark McKinnon (Outside Counsel)
Sent: Friday, April 21, 2016
To: George Swindon (Accounting) ; Lawrence Lawyer (Legal)
CC:
Subject: ParentCo inversion

George and Larry,

In structuring the ParentCo -IrishCo inversion, we will want the interest payments on the IrishCo loan to ParentCo to approximate ParentCo's U.S. earnings. The SEC or IRS may look at this. I've attached a memo with my suggestions, based on the recently released proposed regulations on earnings stripping.

“In Anticipation of Litigation”

- Can arise along a continuum of time before a case is docketed, including when issues are identified during the administrative stage of a dispute
 - ❖ Can occur as early as the transactional stage, if anticipation of litigating the issue is “objectively reasonable”
 - ❖ Implementing a “litigation hold” supports a work product claim
 - ❖ Failure to implement a “litigation hold” undermines a work product claim
- Courts apply various tests to determine whether “work product” applies
 - ❖ Majority test says documents are protected if “prepared ‘because of’ existing or expected litigation” even if their purpose is not to ‘assist in’ litigation.” Dual business/anticipation of litigation purpose is permissible
 - ❖ Two Circuits, the Fifth and the First, follow alternative standards.
 - *Fifth Circuit* follows “primary motivating purpose” test
 - *First Circuit* says material must be “prepared for” possible litigation

Examples of Work Product

- Legal memorandum (in anticipation of litigation)
- Attorney notes (related to potential litigation matter only)
- Attorney legal research binders
- Client development of data and/or analysis at direction of counsel in anticipation of litigation
- Attorney notes on cases and documents (related to potential litigation matter only)
- Attorney or client's notes of witness interview
- Client's notes regarding case strategy

Work Product Waiver

- Work Product Protection is less easily waived than Attorney-Client and Tax Practitioner Privileges
- Intentional waiver is sharing with an **adversary**
- Work product may be shared with a non-adversary, assuming the disclosure does not substantially increase the opportunity for adversaries to obtain the information
- On showing of substantial need by opposing party, fact work product protection may be overcome, but opinion work product remains protected

Attorney-Client Privilege v. Work Product Protection

	Attorney-Client Privilege	Work Product Protection
Coverage	Confidential communications between an attorney and client for purposes of obtaining legal advice	Communications and documents made in “anticipation of litigation”
Privilege Holder	Client	Client and Attorney
Privilege Waiver	Disclosure to third-party outside scope of litigation	Disclosure to adverse party
Waiver exceptions	Common Interest (Joint Defense) Kovel	None (waiver only applies when document is disclosed to adverse party)
Overcoming Privilege	Cannot be breached except in exceptional circumstances	May be breached for “factual information” upon showing of “substantial need”

Privileged?

From: Will Johnson (Outside Counsel)
Sent: Friday, April 21, 2017
To: Steve Campbell (Outside Auditor)
CC: Lawrence Lawyer
Subject: ForeignCo loan to ParentCo

Steve,

On the ForeignCo loan to ParentCo, I think we're in a good litigation position should the IRS try to recharacterize the debt as equity. We structured the instrument to satisfy the *Scottish Power* factors. That case was decided under Ninth Circuit precedent—the same that would apply to ParentCo in litigation. The *Scottish Power* taxpayer prevailed, and we should too.

Thanks,

Will

Kovel Doctrine

- Judicial extension of attorney-client privilege to persons engaged by an attorney or law firm to assist the attorney with providing legal advice to his/her client
- Originates from Second Circuit's opinion in *United States v. Kovel*, 296 F.2d 918 (2nd Cir 1961)
- **Key Elements:**
 - ❖ Expert is engaged by the law firm (“Kovel Letter”)
 - ❖ The purpose of engagement **must** be to assist attorney with providing **legal advice**
 - ❖ Doctrine only protects communications that would otherwise be covered by the attorney-client privilege

Privileged?

MEMORANDUM

To: Lawrence Lawyer

From: Eric Economist

Date: April 25, 2017

Re: ParentCo's Transfer Pricing Method

You have requested that I analyze the economics of ParentCo's intercompany transactions with its foreign subsidiary, ForeignCo. As detailed in the memorandum below, it is my conclusion that the transfer pricing method employed by ParentCo and ForeignCo fails to approximate an arm's-length transaction because it substantially undervalues ParentCo's intellectual property.

Application of *Kovel* Doctrine

When the privilege applies:

- Lawyer supervises analysis, reviews invoices, and uses analysis to provide legal advice to client
- Lawyer engages accountant to provide support and analysis in the course of an IRS exam
- In-house counsel engages valuation expert to value asset in connection with litigation matter

When the privilege does not apply:

- Purpose of the engagement unrelated to legal advice
- Law firm does not substantively supervise the analysis or advice
- Advice relates to business transaction or preparation of tax return (not otherwise privileged)
- Communications are made in the presence or forwarded to a third-party (not confidential or waived)

Best Practices for Establishing *Kovel* Engagement

- Engagement letter is entered into between expert and law firm or legal department
- Law firm (or legal department) should supervise and review expert's billing
- Engagement letter should specifically cite to the *Kovel* case
- Objective of the engagement (assist firm with providing legal advice) should be clearly identified in the engagement letter
- Limit direct communications between the expert and client outside presence of attorney
- Limit non-legal advice provided by the expert in connection with matter
- The expert should segregate files from any other work provided to client and treat law firm (or legal department) as a separate client
- The expert should be educated (by the lawyer) on privilege and waiver issues

Examples of Scope of Coverage

Common Examples	Attorney-Client (IRC 7525)	Work Product
Legal memo to/from client (no anticipation of litigation)	Yes	No
Tax opinion forwarded to auditor (no anticipation of litigation)	No – waived	No
Attorney's collection of legal research in transactional matter (no anticipation of litigation)	Maybe	No
Law firm's legal invoices	Generally no	No
Non-attorney's notes of third-party witness interviews (in litigation matter)	No	Yes
Attorney memo to client re witness interview (in litigation matter)	Yes	Yes
Non-legal communications on which lawyer is copied	No	No

Privileged?

From: Jeff Sanderson (CFO)
Sent: Friday, March 23, 2018
To: Joe DeCastro (COO)
CC:
Subject: RE: Outside Auditors

That's the plan. Worked perfectly this year.

But going forward, I don't want to cook the books anymore. We need to stop doing that.

From: Joe DeCastro (COO)
Sent: Friday, March 23, 2018
To: Jeff Sanderson (CFO)
CC:
Subject: Outside Auditors

Jeff

Just heard that Mike at our outside accounting firm, EWKD, is leaving next year.
Can you find us another clueless auditor for next year?

Best Practices

- Recognize possibility communications may be disclosed to an adversary
 - ❖ Not all communications with attorneys are privileged (i.e., tax accrual workpapers, tax return information, business advice)
 - ❖ Always assume privilege may be waived (intentionally or inadvertently)
- Never mistakenly waive attorney-client privilege
 - ❖ Do not forward privileged documents or information to non-lawyers or lawyers who do not represent the company (i.e., your accountants, auditors, lawyers whose function does not include representing the company)
 - ❖ Do not assert penalty defenses without understanding implications
- Protect privileged documents from inadvertent disclosures
 - ❖ Mark privileged documents and emails: “Privileged & Confidential” or “Prepared at the Direction of Counsel”
 - ❖ Segregate privileged files

Best Practices

- Consider working “at direction” of legal department when working on sensitive matters
- Document factual basis for work product (basis for “anticipation of litigation”)
 - ❖ Litigation hold, other actions consistent with anticipation of litigation
- Consider possible benefits of *Kovel* arrangement when working with experts and outside advisors who are not attorneys
- Understand limitations of the Tax Practitioner Privilege
- For all non-privileged communications, keep in mind the *Anchorage Daily News* Rule (AKA the *Washington Post* Rule, *NYTimes* Rule, *etc.*)

Discussion Scenarios

- **Scenario 1:** In connection with a pending transaction, the Company obtains advice from both a law firm and an accounting firm; the outside advisors coordinate closely in considering options, recommending strategy and implementing the transaction
- **Scenario 2:** The Company wants to acquire another company and, in the diligence process, asks to see privileged memos in the target company's file
- **Scenario 3:** A Company VP emails other executives in the Company recommending how to resolve a legal issue in light of certain business issues the Company faces

Contact Information

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